Supreme Court, U.S.
FILED

No. 01-755

IN THE

Supreme Court of the United States

DENNIS MCLIN,
Petitioner,

v.

BOARD OF POLICE COMMISSIONERS OF THE METROPOLITAN ST. LOUIS POLICE DEPARTMENT, WAYMAN F. SMITH, III, JEFF S. JAMIESON, EDWARD M. ROTH, LESLIE F. BOND, CLARENCE HARMON, PAUL NOCCHIERO, CHARLES MISCHEAUX, ANNE-MARIE CLARKE, MATHEW PADBERG, ROBERT HAAR, AND RONALD HENDERSON.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Board of Police Commissioners of the Metropolitan St. Louis Police Department, Wayman F. Smith, III, Jeff S. Jamieson, Edward M. Roth, Leslie F. Bond, Clarence Harmon, Paul Nocchiero, Charles Mischeaux, Anne-Marie Clark, Matthew Padberg, Robert Harr and Ronald Henderson respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. The decision of the Eighth Circuit below is not published.

STATEMENT OF THE CASE

Plaintiff Dennis McLin filed the underlying action on March 30, 1999, in the United States District Court Eastern District of Missouri against the respondents. Plaintiff, a member of the Metropolitan St. Louis Police Department (MSLPD), filed the underlying action claiming that his First Amendment freedom of speech rights were violated and that defendants were therefore liable under 42 U.S.C. 1983. Plaintiff's complaint alleged that he was disciplined during his employment for exercising his First Amendment right to freedom of speech.

The district court on or about April 21, 2000, entered its Order granting defendants' motion for summary judgment. In its Order, the district court stated that the speech for which plaintiff was disciplined was not protected speech in that it was not a matter of public concern. Alternatively, the district court stated that even if the speech was otherwise on a matter of public concern, the Police Department could nevertheless punish such speech under the analysis of *Pickering v. Board of Education*, 391 U.S. 563 (1968). (Petition For Writ Of Certiorari, p. A-19).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment for the defendants. In its per curiam opinion, the Eighth Circuit assumed, for purposes of its decision, that the speech in which plaintiff engaged was upon a matter of public concern. (Petition, p. A-5). The Eight Circuit agreed with the district court that under *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983), the Police Department could nevertheless impose disciplinary action upon plaintiff. (Id.)

Statement of the Facts

In September of 1997, plaintiff attended a workshop on police brutality and racism sponsored by the National Black Police Association (NBPA) of which plaintiff is the Midwest Regional President. The workshop was held at the Afro Centric Bookstore and was free and open to the public. Plaintiff gave a speech while at the workshop and various portions of that speech were reported by the St. Louis American Newspaper. Included in that report by the St. Louis American were the following passages:

> In St. Louis many "Billy Bob, tobacco chewing white police officers" are recruited from "boondocks Missouri" and lack diversity and racial sensitivity, McLin said.
>
> "Often abusive officers were sissies in high and grade school but when they put on that uniform they are the man they never were before."

Based on the above two comments and not the general topic of the speech (police brutality and racism) the MSLPD charged plaintiff with a violation of Rule 7,

Section 7.004(JJ) of the Police Manual. That Section provides that Police Officers are subject to disciplinary action for engaging in conduct or acts on or off duty which may bring discredit upon the Department or its personnel. Plaintiff was suspended for 15 days without pay for the above violation.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Eighth Circuit's Opinion Is Wholly Consistent With *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968)

At page 7 of his Petition for a Writ of Certiorari, Petitioner Dennis McLin states that "the District Court expressed doubt as to the public significance of McLin's speech about racism and police brutality in the Metropolitan St. Louis Police Department (MSLPD), holding that it was not a matter of public concern, . . ." The district court specifically pointed out that the Petitioner was correct in asserting that his general discussion of alleged racial problems was protected speech on a matter of public concern. (See Petition, p. A-14). The district court then went on to properly point out that the Court's inquiry was not whether all of the Petitioner's statements were of public concern but only the comments for which he was disciplined. (Id., pp. A-14 - A-15). The district court held that the comments for which Petitioner was disciplined were nothing more than personal attacks on fellow officers and therefore not protected speech. (Id., p. A-15). More importantly, the district court clearly noted the importance of Petitioner's failure to dispute that he was punished only for two specific comments and not the more general comments he made

concerning alleged racism within the Police Department.[1] (Id. A-14).

Petitioner's specific comments concerning the "Billy Bob tobacco chewing white police officers" and that his "fellow officers are sissies" is the type of caustic personal attack which is no longer deemed relevant to a matter of public concern. See *Connick v. Myers*, 461 U.S. 138, 146-149 (1983). Petitioner failed to cite a single case in response to the Summary Judgment Motion; in his brief in the Eighth Circuit; in his Motion for Rehearing, en banc in the Eighth Circuit; or in his Petition for Writ of Certiorari where any Court has upheld the right of a governmental employee (especially a governmental employee within a police or fire department) to use racially derogatory remarks and then hide behind his or her First Amendment Right to freedom of speech. Should Petitioner be allowed to use this type of language against fellow officers with no fear of discipline, the ability of the Board of Police Commissioners and other governmental units to create the atmosphere where employees are able to efficiently perform their jobs will be greatly impaired.[2] The Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968) clearly understood the importance that the State has in promoting such efficiency in

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[1] The two comments that were the basis for Petitioner's discipline are set forth in the district court's opinion at p. A-10 of the Petition.

[2] Respondents would also note that under *Monell v. New York Dept. of Social Services* 436 U.S. 658 (1978) and 42 U.S.C. 1983 they may be held liable for a failure to discipline officers. It is no great stretch to imagine a scenario where the Board of Police Commissioners could be held liable for Officer McLin's behavior based upon a theory of failing to discipline him for making racially derogatory remarks.

its public services. Nothing in the summary judgment order or the opinion of the Eighth Circuit conflicts with the plain language or the intent of *Pickering*.

Petitioner's argument that speech on police racism and brutality is a matter of public concern is not in dispute here. As pointed out previously, what is in dispute is whether or not his personal, caustic attacks on his co-workers are a matter of public concern. Clearly they are not. Petitioner argues that the district court took insufficient note of the history of racial profiling of African Americans. That is only relevant if the speech for which he was disciplined was a matter of public concern. *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education* 391 U.S. 563 (1968). Petitioner has never been able to cite a case wherein a public employee was allowed to defend racially derogatory comments about fellow employees by arguing they are a matter of public concern.

Petitioner further argues that the public employer may not punish an employee for speaking on a matter of public concern unless it can make a substantial showing of actual or potential disruption. Petitioner misrepresents the evidence produced against Officer McLin which included letters of complaints submitted by representatives of two police officer associations which comprise a large percentage of the officers employed by the St. Louis Metropolitan Police Department.[3] The

[3] Page 14 of the Petitioner's Petition for Writ of Certiorari refers to a "heckler's veto" that would obliterate the *Pickering* balancing test. The Petition ignores the fact that Lieutenant Simpher testified at Officer McLin's board hearing that two letters were received from police organizations representing a significant number of fellow officers within the Department expressing concern over the comments published.

Pickering balancing test need not be applied as the public has little interest in a public employee's uncouth deprecations of his supervisor. The same analogy would apply to the Petitioner's uncouth deprecations of his co-workers.

Lastly, the public employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick v. Myers*, 461 U.S. at 152. "[W]e have consistently given greater deference to governmental predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on speech by the public at large." *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

The issues concerning "public concern" and "balancing" are issues of law. No misapplication of the law was made by the Eighth Circuit. Personal caustic attacks are not protected speech, therefore, the *Pickering* balancing test is irrelevant. Despite that, the district court, in an abundance of caution reviewed this test and concluded that it weighed in favor of the Board of Police Commissioners' decision to discipline Officer McLin for his racially derogatory remarks.

WHEREFORE, Respondents pray that the Court deny Petitioner's Petition for a Writ of Certiorari and that no further action be taken by the Court regarding this matter.

RESPECTFULLY SUBMITTED,

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